Supreme Court, U.S.
FILED
051561 JUN 5 - 2006
OFFICE OF THE CLERK

NO. _____

In the

Supreme Court of the United States

Kenneth William Jacobsen,

Petitioner,

V.

Clarence E. Haynes,

Respondent.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Kenneth William Jacobsen
Petitioner In Pro-Se
18414 Beach Blvd., #100
Huntington Beach, California 92648
(714) 375-1212

Questions Presented for Review

1. DOES THE LOWER COURTS' DECISION THAT PETITIONER'S CIVIL COMPLAINT AGAINST COMMISSIONER HAYNES AS BARRED BY JUDICIAL IMMUNITY CONFLICT WITH THIS COURT'S DECISION IN MIRELES V. WACO, 502 U.S. 9 (1991)?

2. DID THE LOWER COURT ERROR IN SETTING ASIDE THE DEFAULT ENTERED BY THE CLERK OF THE DISTRICT COURT UNDER RULE 55, OF THE FEDERAL RULES OF CIVIL PROCEDURE?

A. THE CIRCUIT COURTS ARE SPLIT ON WHETHER SERVICE UNDER RULE 4, IS EFFECTED ONLY UPON ACKNOWLEDGMENT OR PERSONAL SERVICE. THIS COURT SHOULD RESOLVE THE CONFLICT. RULE 10 (a), OF THE SUPREME COURT RULES.

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BRIEF FOR THE PETITIONER

OPINION BELOW

The decision of the Ninth Circuit Court of Appeals rejecting Petitioner's appeal is unreported. The Memorandum Decision is reproduced at Appendix EXHIBIT "F" Page 59a.

JURISDICTION

The Memorandum Decision of the Ninth Circuit Court of Appeals was filed on March 17th, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (a).

STATEMENT

On July 13th, 2004, Petitioner brought his Federal cause of action pursuant to 42 U.S.C. § 1983, and provided the District Court with federal jurisdiction under 28 U.S.C. §§ 1331 and 1343. In his Complaint, Petitioner alleged that Defendants Clarence E. Haynes and Orange County violated [his] clearly established Due Process rights secured by the United States Constitution.

In the Cause of Action, Petitioner alleged that Defendants' practices; acts and/or policies violated his Due Process rights by wrongly incarcerating, convicting, and placing Appellant on summary probation without jurisdiction.

Defendants were served on July 13, 2004. Defendant Orange County answered the Complaint by Motion to Dismiss under Rule 12 (b)(6), and a Motion to Strike. Defendant Haynes **failed** to answer the Complaint within the 20 days required by the Summons issued by the Clerk of the Court on July 13th, 2004. On August 25th, 2004, Petitioner requested the Clerk to enter Default under Rule 55 (a)(1), of the Federal Rules of Civil Procedure.

On August 27th, 2004, the Clerk entered a Notice of Deficiency for lack of required information. On September 24th, 2004, Petitioner provided an Amended Proof of Service to the Clerk. The Clerk accepted the Proof of Service upon Defendant Haynes on July 13th, 2004, with an Answer to the Complaint due on August 2nd, 2004. On September 24th, 2004, Petitioner requested the Clerk to reconsider the entry of Default, and on October 6th, 2004, the Clerk entered a Default against Defendant Haynes.

On October 18th, 2004, Counsel for Defendant Haynes, filed his Notice of Motion and Motion to Set Aside Default. Counsel set the motion for hearing for November 8th, 2004. Counsel failed to appear for the November 8th hearing. Petitioner made his appearance for the November 8th hearing; however, the District Court reset the hearing for November 15th, 2004.

On November 15th, 2004, the District Court heard both sides on the Default issue entered by the Clerk and Granted Defendants' Motion to Set Aside Default filed by Opposing Counsel. See, Transcript of said hearing attached to the Appendix, as EXHIBIT "C" Page 5a.

On December 7th, 2005, Defendant Haynes, through Counsel, filed his Motion To Dismiss. On January 28th, 2005, Petitioner filed his Opposition to Motion to Dismiss. On March 29th, 2005, the Magistrate Judge made his Report and Recommendation and recommended that the motions to dismiss be granted without leave to amend denied "County's" motion to strike as moot and further recommended "dismissing the entire action with prejudice." On April 12th, 2005, Petitioner filed his Objection to the Report and Recommendation.

On April 14th, 2005, the District Judge ordered approving and adopting the Magistrate's Report and Recommendation and entered Judgment dismissing the action "with prejudice for reasons set forth in Magistrate Judges' Report and Recommendation." On April 22nd, 2005, Petitioner timely filed his Notice of Appeal to the Ninth Circuit Court of Appeals.

It was the District Court setting aside the Default entered by the Clerk of the Court and the dismissal of the Civil Complaint based on the Magistrate Judge's Report and Recommendation that formed the basis of the appeal to the Court of Appeals and now the Petition before this Court.

REASONS FOR GRANTING THE PETITION

As to the ***First Question***, this Honorable Court should grant review because the lower Courts' decision that Petitioner's Civil Complaint against Commissioner Haynes was barred by ***judicial immunity*** conflicts with this Court's decision in ***Mireles v. Waco, 502 U.S. 9 (1991).*** Supreme Court Rules, Rule 10 (c), i.e., "has decided an

important federal question in a way that conflicts with relevant decisions of this Court."

As to the ***Second Question,*** this Honorable Court should grant review because the lower Courts erred in setting aside the Default entered by the Clerk of the District Court under Rule 55 (a), Federal Rules of Civil Procedure, and the Circuit Courts are split on whether service under Rule 4, is effected only upon acknowledgment or personal service. This Court should resolve the conflict among the Circuit Courts. Supreme Court Rules, Rule 10 (a).

ARGUMENTS

1. THE LOWER COURTS ERRED IN HOLDING THAT PETITIONER'S CIVIL ACTION AGAINST COMMISSIONER HAYNES WAS BARRED BY JUDICIAL IMMUNITY.

Petitioner strongly objected to the conclusion that Commissioner Haynes was entitled to absolute immunity under the circumstances. Petitioner submitted to the argument raised in his Opposition to Haynes' Motion to Dismiss filed on January 28th, 2005, at pp. 7-8.

Commissioner Haynes' assertion that Petitioner's Civil Complaint was barred by the **"long-established doctrine of absolute judicial immunity"** [because] Petitioner's Complaint was based on Commissioner Haynes's actions as a **trial judge** in connection with Petitioner's case was absolutely incorrect.

Commissioner Haynes was not a **"judge," i.e., a Superior Court Judge, but was a "Commissioner" with no authority to do acts in excess of those proscribed**

by the "California Constitution." Art. VI, § 22, provides – "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to *perform subordinate judicial duties*."

The Court of Appeals of California in ***People v. Oaxaca, 39 Cal. App. 3d 153 (1974)*** stated:

> "[W]e recognize that a **commissioner**, as such, **has no authority to do acts in excess of those generally prescribed by the Constitution (art. VI, § 22).** We determine that **sentencing, in cludeing imposition of probation**, is certainly not a '**subordinate judicial duty**' even when the defendant has pleaded guilty."

Thus, Commissioner Haynes, did not have the authority to act as a "judge," i.e. in a Judge's official capacity as contemplated by the California Constitution and lacked "jurisdiction" to perform a "judicial act." ***People v. Oaxaca***, supra.

In ***Mireles v. Waco, 502 U.S. 9 (1991)***, this Honorable Court eloquently stated:

> "our cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for **nonjudicial actions,** i.e., actions not taken in judge's judicial capacity. ***Forrester v. White, 484 U.S. 227-229***; ***Stump v. Sparkman, 435 U.S. at 360.*** Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction."

It is clear that even "**judges**" do not enjoy "**absolute immunity**" when their action is not taken in a "**judge's judicial capacity**" and action taken in "**complete absence of all jurisdiction.**" ***Mireles v. Waco,*** supra.

Thus, the lower Courts' decision that Petitioner's Civil Complaint against Commissioner Haynes was barred by "judicial immunity" is incorrect and conflicts with this Court's decision in ***Mireles v. Waco, supra.***

2. THE LOWER COURT ERRED IN SETTING ASIDE THE DEFAULT ENTERED BY THE CLERK OF THE DISTRICT CLERK UNDER RULE 55, OF THE FEDERAL RULES OF CIVIL PROCEDURES.

Petitioner basis this err on a two-fold premise, i.e., Counsel's failure to appear for hearing upon [his] Motion to Set Aside Default on November 8th, 2004, and the District Court granting the Motion to Set Aside the Default entered by the Clerk of the Court. Viz:

On October 18th, 2004, Counsel for Defendant Haynes, filed his Notice of Motion and Motion to Set Aside Default and set the hearing for November 8th, 2005. Counsel failed to appear for the November 8th hearing. Petitioner made his appearance for the November 8th hearing; however, the District Court reset the hearing for November 15th, 2004.

At the November 15th hearing, Petitioner objected to Counsel's failure to appear and defend his Motion to Set Aside Default and objected to Counsel's failure to provide Petitioner with 10-day notice of his Motion and failed to serve Petitioner with a copy of said Motion.

See, Transcript of November 15th hearing at pages 8a-10a, marked Exhibit "C" in the Appendix.

The District Court erred in granting Counsel's Motion to Set Aside Default. Counsel failed to appear for the hearing of November 8th. Cf. *Seven Elves Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981).* Also, Counsel failed to provide Petitioner with 10-day notice and failed to serve Appellant with a copy of said motion as required by the Federal Rule of Civil Procedure. Counsel was the **"moving party," and Counsel's "failure to appear [was] deemed consent to a ruling upon the motion adverse to that counsel's position."** Local Rule 7-14.

Second, the District Court erred in concluding that the "service" was improper under Rule 4, and erred in setting aside the Default entered by the Clerk of the Court. Petitioner demonstrated to the Clerk of the Court that **service was properly made and the Clerk acknowledged this fact by entering a Default under Rule 55.**

Petitioner demonstrated that Rule 4 permitted service by first-class mail if upon return by the person served, has a **signed acknowledgment.** Here, **"acknowledgment"** was accomplished when Defendant Haynes or his clerk **"signed"** the Postal Service Form 3811. The District Court, in viewing the Form 3811 at the November 15th hearing, acknowledged a **signature and actual notice of the service of the Summons and Complaint.** Petitioner requested the Ninth Circuit to take **"judicial notice"** of the Court record in this cause to the original **Postal Service Form 3811.**

In ***Tolefree v. Oakland Police Enterprise, 2002 WL 31357691 (N.D. Cal.),*** the District Court held, quoting ***Barlow v. Ground, 39 F.3d 231, 234 (9th Cir. 1994),***

that: **"Service by mail, however, is 'valid only if a signed acknowledgment is returned' to the sender by the defendant within 20 day of the mailing of the summons and complaint."**

The record in the present case clearly demonstrates, a signature, acknowledgment, and returned within 20 days of mailing of the summons and complaint. ***Barlow v. Ground, supra.*** The District Court erred in setting aside the Default entered by the Clerk of the Court under Rule 55.

The Ninth Circuit erred in concluding that Haynes's motion to set aside the default was proper "because Haynes did not engage in any culpable conduct that led to the default." If a defendant "**has received actual or constructive notice of the filing of the action and failed to answer,**" the conduct is culpable. See, ***Direct Mail Specialists, Inc. v. Eclat Computerized Techs, Inc. 840 F.2d 685, 690 (9th Cir. 1988)*** and ***Franchise Holding II, LLC. V. Huntington Restaurants Group, Inc., 375 F.3d at 926 (9th Cir. 2004).***

Here, Defendant Haynes's conduct was **culpable**, i.e., Defendant Haynes **received actual or constructive notice of the filing of the action and failed to answer the complaint until after the Clerk of the Court entered a Default against him under Rule 55.**

A. THE CIRCUIT COURTS ARE SPLIT ON WHETHER SERVICE UNDER RULE 4, IS EFFECTED ONLY UPON ACKNOWLEDGMENT OR PERSONAL SERVICE.

It should be noted that the circuits are split on whether service under Rule 4, is sufficient if the defendants have **actual notice, or whether service is effected only upon acknowledgment or personal service.** See, *Guth v. Andersen, 118 F.R.D. 502 (N.D. 1988).* Viz:

Morse v. Elmira County Club, 752 F.2d 35 (2nd Cir. 1984) (notice sufficient); *Lee v. Carlson, 645 F. Supp. 1430 (S.D.N.Y. 1986)* (service effective even though no acknowledgment form and return envelope), aff'd 812 F.2d 712 (2nd Cir. 1987); but see *Combs v. Nick Garin Trucking, 825 F.2d 437 (D.C. 1987)* (acknowledgment required); *Green v. Humphrey Elevator and Truck Co., 816 F.2d 877 (3rd Cir. 1987)* (acknowledgment required); *U.S. v. Gluklich, 801 F.2d 834 (6th Cir. 1986)* (legislative history supports acknowledgment requirement); *Delta Steamships Lines, Inc. v. Albano, 768 F.2d 728 (5th Cir. 1985)* (Legislative history indicates Rule 4 is an integrated provision for establishing in personam jurisdiction and service of jurisdiction); Armco. Inc. v. Penrod-Stauffer Building Systems, Inc. 733 F.2d 1087 (4th Cir. 1984) (plain requirements may not be ignored).

The Ninth Circuit has not decided this issue. The Court stated that courts should "liberally construe" the requirements of Rule 4 when the defendants have actual notice and that they should "generally be more solicitous of the rights of pro se litigants." See, *United Food and Commercial Workers Union v. Alpha Beta Co. 736 F.2d 1371, 1382 (9th Cir. 1984).*

This Court should resolve the conflict. RULE 10 (a), OF THE SUPREME COURT RULES.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant the Petition for Writ of Certiorari and review the lower Courts decisions.

Respectfully submitted,
s/_____
Kenneth William Jacobsen
Petitioner In Pro-Se

Dated: May___, 2006

EXHIBIT "A"

DEFAULT ENTERED BY CLERK OF DISTRICT COURT UNDER RULE 55(a):

FILED
OCT- 6 2004
CLERK, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION AT SANTA ANA BY s/_____ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH WILLIAM JACOBSEN, JOHN DOES 1-10 PLAINTIFF(S) CLARENCE E. HAYNES, ORANGE COUNTY CALIFORNIA	CASE NUM SACV04-832 CJC (ANx) DEFAULT BY CLERK F.R.Civ.P. 55(a)

It appearing from the records in the above-entitled action that summons has been served upon the defendant(s) named below, and it further appearing from the affidavit of counsel for the Plaintiff, and other evidence as required by F.R.Civ.P. 55(a), that each of the below defendants have failed to plead or otherwise de-

fend in said action as directed in said Summons and as provided in the Federal Rules of Civil Procedure:

Now, therefore, on request of counsel, the DEFAULT of each of the following named defendant(s) is hereby entered:

CLARENCE E HAYNES

DOCKETED ON CM

OCT— 6 2004

BY s/_____040

Clerk, U. S. District Court

10/06/04
Date

By s/_____
Deputy Clerk
LORI ANDERSON

EXHIBIT "B"

DISTRICT COURT SETTING ASIDE CLERK'S ENTRY OF DEFAULT UNDER RULE 55(a):

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 04-832 CJC (ANx) Date: Nov. 16, 2004

Title: KENNETH W. JACOBSEN v. CLARENCE E. HAYNES, et al.

PRESENT:

HONORABLE CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

Debra Beard	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLANITIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANT CLARENCE HAYNES MOTION TO SET ASIDE DEFAULT (FILED 8/5/04)

Defendant's motion to set aside entry of default is GRANTED. Plaintiff did not properly serve Defendant with the Complaint as required by Federal law and, therefore, the Clerk's entry of default was in error.

ljm

DOCKETED ON CM

MINUTES FORM 11
CIVIL-GEN

NOV 18 2004

BY s/_____040

Initials of Deputy Clerk s/_____

EXHIBIT "C"

REPORTER'S TRANSCRIPT OF NOVEMBER 15TH, 2004, HEARING:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

THE HON. CORMAC J. CARNEY, JUDGE PRESIDING

KENNETH W. JACOBSEN)
PLAINTIFF,)
) NO. CV 04-832-CJC
VS.) (ANX)
)
CLARENCE E. HAYNES,)
DEFENDANT)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SANTA ANA, CALIFORNIA

MONDAY, NOVEMBER 15, 2004

MARIA DELLANEVE, CSR 9132

UNITED STATES COURTHOUSE
RONALD REAGAN FEDERAL BUILDING
411 WEST FOURTH STREET
SANTA ANA, CALIFORNIA 92701
(714) 564-9259

APPEARANCES OF COUNSEL:

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(714) 375-1212

FOR THE DEFENDANT:
STATE OF CALIFORNIA, DEPT OF JUSTICE
MARTIN AGESON, DEP. ATTY GENERAL.
300 SOUTH SPRING STREET, SUITE 5000
LOS ANGELES, CALIFORNIA 90013
(213) 897-2147

SANTA ANA, CALIFORNIA; ON MONDAY, NOVEMBER 15, 2004 1:30 P.M.

THE CLERK: YOUR HONOR, THIS IS THE THIRD ADDENDUM TO THE CALENDAR SA CV 04-832-CJC. KENNETH W. JACOBSEN VERSUS CLARENCE E. HAYNES.

COUNSEL, PLEASE STATE YOUR APPEARANCES.

MR. JACOBSEN: I'M HERE, KENNETH W. JACOBSEN.

THE COURT: HELLO, MR. JACOBSEN. NICE TO SEE YOU AGAIN, SIR.

MR. AGESON: MARTIN AGESON, DEPUTY ATTORNEY GENERAL ON BEHALF OF THE MOV-

ING PARTY DEFENDANT JUDGE CLARENCE E. HAYNES.

THE COURT: NICE TO SEE YOU, MR. AGESON.

MR. AGESON, WE WERE HERE LAST WEEK. UNFORTUNATELY, YOU WEREN'T HERE. I'M NOT SURE WHY THAT WAS, SIR, BUT IN ANY EVENT, I HAD A DISCUSSION WITH MR. JACOBSEN AND I INDICATED TO HIM THAT I BELIEVE THERE WAS A PROBLEM WITH THE DEFAULT IN THAT, I DIDN'T THINK THERE WAS PROPER SERVICE. AND HE SAID, WELL, I WANT TO BE HEARD ON THAT BECAUSE I DISAGREE. AND I SAID, WELL, IT WOULDN'T BE PRODUCTIVE BECAUSE WE HAVE NO ONE HERE REPRESENTING COMMISSIONER HAYNES. SO WHY DON'T WE CONTINUE THIS FOR ONE WEEK. AND THAT'S WHERE WE ARE. GIVEN THE TENTATIVE IS IN YOUR FAVOR, WHY DON'T WE LET MR. JACOBSEN EXPLAIN TO US WHY HE THINKS I'M WRONG.

MR. JACOBSEN: DO YOU WANT ME TO GO TO THE PODIUM?

THE COURT: YES, PLEASE.

MR. JACOBSEN: BEFORE WE PROCEED ON THAT, I HAVE A QUESTION FOR YOU. IS IT SAFE TO PRESUME THAT HAYNES WAS PROPERLY SERVED, THE SUMMONS, BEING THIS ISSUE IS NOT ABOUT THE SUMMONS, IT'S ABOUT THE

COMPLAINT?

THE COURT: NO. BECAUSE FOR PURPOSES -- I THINK OF YOUR QUESTION, THE SUMMONS AND THE COMPLAINT ARE ONE AND THE SAME. SO BASICALLY, HE'S SAYING WE DIDN'T HAVE NOTICE THAT WE WERE GETTING SUED HERE.

MR. JACOBSEN: SO HE IS CLAIMING THAT HE WAS NEVER SERVED AND HE NEVER RECEIVED A COPY OF THE COMPLAINT AND THE SUMMONS?

THE COURT: WELL, I'M NOT SURE HE IS SAYING THE LATTER PART, SIR. HE IS SAYING WE NEVER WERE PROPERLY SERVED AND MY GUT TELLS ME HE PROBABLY DIDN'T RECEIVE A COPY OF IT EITHER. BUT THAT'S NOT THE ARGUMENT. AS I UNDERSTAND, THAT THE ATTORNEY GENERAL IS MAKING, I UNDERSTAND YOUR ARGUMENT IS SERVICE WAS IMPROPER. YOU CAN'T JUST SERVE A COPY LIKE THIS AT THE COURTHOUSE. AND THE FACT THAT A DEFAULT WAS ENTERED AGAINST A COMMISSIONER SUGGESTS TO ME THAT HE DIDN'T HAVE PROPER NOTICE BECAUSE I CAN'T BELIEVE A COMMISSIONER WOULD BE TOO HAPPY TO KNOW THAT HE GOT SUED AND NO ONE WAS THERE TO DEFEND HIM.

MR. JACOBSEN: I AGREE WITH YOU. WELL, WITH ALL DUE RESPECT TO THE COURT, IT'S MY POSITION THAT THIS COURT SHOULD NOT CONSIDER DEFENDANT'S MOTION TO SET

ASIDE THE CLERK'S DEFAULT ON THE FOLLOWING REASONS. IF YOU'LL FORGIVE ME, I BETTER READ IT OR I'LL MISS IT.

THE COURT: THAT'S FINE.

MR. JACOBSEN: FIRST, DEFENDANT ATTORNEY, THE DEPUTY ATTORNEY GENERAL, FAILED TO APPEAR LAST WEEK TO DEFEND THEIR POSITION. IN FACT, THIS COURT THOUGHT THAT I WAS THE ATTORNEY GENERAL AND STATED THAT THE COURT WILL GRANT THE MOTION TO SET IT ASIDE BECAUSE I DID NOT APPEAR. BUT, OF COURSE, THE COURT CHANGED ITS MIND WHEN THE COURT RECOGNIZED THAT I WAS THE PLAINTIFF AND NOT THE DEPUTY ATTORNEY GENERAL.

THE COURT THEN ORDERED THE CLERK TO OBTAIN A WRITTEN EXPLANATION FROM THE DEPUTY ATTORNEY GENERAL AS TO WHY HE FAILED TO APPEAR. IT WAS THE DEPUTY ATTORNEY GENERAL WHO WAS THE MOVING PARTY AND YET HE FAILED TO APPEAR BEFORE THE COURT AND DEFEND HIS POSITION BASED ON THE MOTION. FOR THIS FAILURE, THIS COURT SHOULD OVERRULE THE ATTORNEY GENERAL'S MOTION TO SET ASIDE THE CLERK'S JUDGMENT. AFTER ALL, IF I HAD FAILED TO APPEAR AND DEFEND MY MOTION, THIS COURT WOULD HAVE OVERRULED OR EVEN DISMISSED FOR FAILURE TO APPEAR OR FAILURE TO PROSECUTE.

AS JUDGE REINHART FROM THE 9TH CIR-

CUIT STATED, WHAT'S GOOD FOR THE GOOSE, IS GOOD FOR THE GANDER. I BELIEVE THAT WAS IN MARTINEZ VERSUS YELTS. I CAN'T PRONOUNCE IT.

FURTHER, THE DEPUTY ATTORNEY FAILED TO PROVIDE ME WITH A 10-DAY NOTICE AS REQUIRED BY FEDERAL RULES OF CIVIL PROCEDURE, I THINK IT'S IN RULE 12, IN ORDER TO AFFORD ME TIME TO PREPARE A WRITTEN MOTION IN OPPOSITION OF HIS MOTION TO SET ASIDE THE CLERK'S JUDGMENT -- DEFAULT, EXCUSE ME.

SO CONSEQUENTLY, I HAVEN'T HAD TIME TO REALLY SUBMIT SOMETHING THAT'S NOT HINDERED BY MY INABILITY TO VOCALIZE WHAT I'M TRYING TO SAY. ALSO, THE DEPUTY ATTORNEY GENERAL DID NOT SERVE ME WITH A COPY OF HIS WRITTEN MOTION. I FOUND OUT ABOUT THE MOTION IN THE HEARING ONLY BY MY RESEARCHER WHO HAD BEEN CHECKING THE FILES IN MY CASE. IT IS THE DEPUTY ATTORNEY GENERAL WHO HAS FAILED TO PROPERLY SERVE DOCUMENTS IN HIS PROCESS. NOT ONLY IS DEFENDANT HAYNES IN DEFAULT, SO IS THE DEPUTY ATTORNEY GENERAL. THIS COURT MUST OVERRULE THE DEPUTY ATTORNEY GENERAL'S MOTION TO SET ASIDE THE CLERK'S JUDGMENT.

SECOND, --

THE COURT: OKAY. THAT'S FIRST?

MR. JACOBSEN: THAT'S FIRST, SECOND, THE DEFENDANT, CLARENCE E. HAYNES, HAS BEEN PROPERLY AND LAWFULLY SERVED. THE CLERK HAS ENTERED A PROPER AND LAWFUL DEFAULT AGAINST THE DEFENDANT HAYNES VIA THE PROOF OF SERVICE FORM PROVIDED BY THIS DISTRICT AND THE CLERK'S OFFICE, PROOF OF SERVICE SUMMONS AND COMPLAINT, WHICH IS ATTACHED TO THE COMPLAINT FORM PACKAGE, CONFORMS TO RULE FIVE OF THE FEDERAL RULES OF CIVIL PROCEDURE. BY USING THIS FORM, IS PROOF OF SERVICE. THE SUMMONS AND COMPLAINT IS PROPER AND LAWFUL. UNDER THE FORM AND PROCESS PROVIDED BY IN DISTRICT, THE CLERK'S OFFICE AND PURSUANT TO RULE FIVE OF THE RULES OF PROCEDURE, DEFENDANT HAYNES WAS PROPERLY AND LAWFULLY SERVED. THE CLERK ENTERED A PROPER AND DEFAULT JUDGMENT.

FURTHER, RULE 4 (C) (2) (F) (C) (2) AND (L) (3), PROVIDES SERVICE BY FIRST CLASS MAIL IF UPON A RETURN BY THE PERSON SERVED SIGNED ACKNOWLEDGEMENT. HERE, THE ACKNOWLEDGMENT WAS ACCOMPLISHED WHEN DEFENDANT HAYNES OR HIS CLERK OR HIS SECRETARY SIGNED THE POSTAL FORM 3811, THE GREEN CARD. THIS CONFORMS SUBSTANTIALLY TO RULE 4C2FC2 AND (L) (3) AND DEFENDANT HAYNES WAS PROPERLY AND LAWFULLY SERVED. THE CLERK ENTERED A PROPER AND LAWFUL DEFAULT.

ORANGE COUNTY RESPONDED TIMELY AND THEY WERE SERVED IN THE SAME MANNER AND AT THE SAME TIME AS DEFENDANT HAYNES. YET NOT UNTIL 90 DAYS HAD PASSED, DID WE HEAR ANY RESPONSE FROM HAYNES, 90 DAYS, NOT 20, NOT 30, NOT 40, BUT 90 DAYS. AND IT'S SIGNED, THE RETURN WAS SIGNED. IT SHOULD BE NOTED THAT THE CIRCUIT COURTS 2, 3, 4, AND 6 ARE SPLIT ON WHETHER SERVICE UNDER RULE 2 (C) (2) (C) (2) OF THREE -- EXCUSE ME, 4 (C) (2) (C) (3) IS SUFFICIENT IN THE DEFENDANT IF THE DEFENDANTS HAVE ACTUAL NOTICE. THE KEY IS THE.ACTUAL NOTICE OR WHETHER SERVICE IS EFFECTED ONLY BY ACKNOWLEDGED OR PERSONAL SERVICE. THAT IS UNDER GUD VERSUS ANDERSON 118 F.R. 502ND CAL.

DO WE HAVE WATER HERE?

THE COURT: I'M NOT SURE IF WE HAVE WATER HERE.

MR. JACOBSEN: NOW, HERE IN THIS CASE, I AM A PRO SE LITIGANT, OBVIOUSLY, NOT A POLISHED ATTORNEY. AND DEFENDANT HAYNES DID RECEIVE THE SUMMONS AND COMPLAINT BY CERTIFIED MAIL AND ACKNOWLEDGEMENT WAS MADE BY SIGNED RECEIPT. SO --

THE COURT: WHERE IS THAT? WHERE IS THE SIGNED ACKNOWLEDGMENT?

MR. JACOBSEN: THAT'S IN THE FILE. YOU HAD THE FILE OR YOU HAD THE FILE AND YOU HAVEN'T BEEN ABLE TO GET IT. IT'S IN THERE.

THE COURT: ALL RIGHT. HOLD ON ONE SECOND. I HAVE A U.S. POSTAL SERVICE CERTIFIED MAIL RECEIPT IN FRONT OF ME.

MR. JACOBSEN: THE ACKNOWLEDGMENT IS ALSO IN THE FILE WITH THE PROOF OF SERVICE.

THE COURT: WITH YOUR PROOF OF SERVICE?

MR. JACOBSEN: THERE IS A SIGNED RECEIPT IN THERE.

THE COURT: ALL RIGHT. KEEP GOING.

MR. JACOBSEN: AS I SAID, HERE I AM A PRO SE LITIGANT. HE DID RECEIVE THE SUMMONS AND COMPLAINT, CERTIFIED, ACKNOWLEDGED, SIGNED RECEIPT. DEFENDANT HAYNES KNEW THE SUMMONS WAS ISSUED AND A COMPLAINT FILED AGAINST HIM OVER 90 DAYS AGO. MOST OF THE CASES I HAVE READ, THEY TALK ABOUT 3 DAYS LATE, 7 DAYS LATE, 10 DAYS LATE. I'VE NEVER READ ONE THAT WAS 70 DAYS LATE. THAT DOESN'T MEAN IT DOESN'T EXIST. I JUST HAVEN'T READ IT.

THERE IS ANOTHER ISSUE HERE THAT I WANT TO PRESERVE AND OBJECT TO. IT'S THE

ALLEGED AFFIRMATIVE DEFENSE OF ABSOLUTE JUDICIAL IMMUNITY RAISED BY THE DEPUTY ATTORNEY GENERAL FOR DEFENDANT HAYNES. FIRST OF ALL, DEFENDANT HAYNES HAS WAIVED ANY IMMUNITY BY FAILING TO ANSWER THE ALLEGATIONS OF THE COMPLAINT UNDER RULE 12, RULES OF CIVIL PROCEDURE.

SECOND, DEFENDANT HAYNES BY FAILING TO PLEA AND DEFEND, HAS ADMITTED TO THE ALLEGATIONS OF THE COMPLAINT AS IN WING VERSUS EAST RIVER CHINESE RESTAURANT 1995, 884 FEDERAL SUPPLEMENT 663.

MOREOVER, DEFENDANT HAYNES IS NOT A JUDGE, BUT IS IN FACT, AND WAS A COMMISSIONER, WHO HAS NO AUTHORITY OR JURISDICTION TO PERFORM OTHER THAN SUBORDINATE JURISDICTIONAL DUTY, AND WHICH DUTY AMONG OTHER DUTIES, DOES NOT INCLUDE IMPOSITION OF PROBATION. LET'S SEE, I'M GOING TO PRONOUNCE IT AS BEST I CAN. OAXACA, 39 CAL.APP 3RD 153, 1974, AND ARTICLE 622 OF THE CALIFORNIA CONSTITUTION.

THUS, YOUR HONOR, I SUBMIT WITH THE AFOREMENTIONED AND RESPECTFULLY MOVE THIS COURT TO OVERRULE DEFENDANT HAYNES' MOTION TO SET ASIDE DEFAULT UPON THE DEFAULT AND UPHOLD THE DEFAULT ENTERED BY THE CLERK OF THE COURT.

THE COURT: ALL RIGHT. SIR, I UNDER-

STAND YOUR POSITION. WE'LL HEAR FROM MR. AGESON.

MR. AGESON, I THINK THERE ARE TWO ISSUES I WOULD LIKE TO HEAR FROM YOU ON. FIRST IS, THE ARGUMENT THAT PROCEDURALLY BY NOT SHOWING UP, BY NOT ALLEGEDLY PROPERLY SERVING MR. JACOBSEN WITH YOUR MOVING PAPERS THAT AS A MATTER OF PROCEDURE, YOUR MOTION SHOULD BE DENIED. AND THEN SECOND OF ALL, AS I TAKE IT, A SUBSTANTIVE ARGUMENT THAT COMMISSIONER HAYNES WAS SERVED. AND I DO HAVE IN FRONT OF ME NOW, I DON'T KNOW IF YOU HAVE SEEN IT, SIR, I DO HAVE A SIGNED RECEIPT OF CERTIFIED MAIL.

MR. AGESON: OKAY.

THE COURT: DATED JULY 15.

MR. AGESON: ALL RIGHT. YOUR HONOR. I'LL START WITH THE PROCEDURAL ISSUE FIRST. I APOLOGIZE TO THE COURT AND TO PLAINTIFF FOR NOT APPEARING LAST MONDAY. I MADE A CALENDARING MISTAKE. I THOUGHT IT WAS OFF CALENDAR, AND FOR THAT, I'M VERY, VERY SORRY.

I DON'T THINK THAT HAS ANY PERTINENCE TO THE POSITION OF MY CLIENT IN A QUESTION OF WHETHER THERE IS JURISDICTION OVER MY CLIENT IN THIS COURT. AGAIN, I

APOLOGIZE FOR MY NOT BEING HERE.

THE COURT: DID YOU SERVE MR. JACOBSEN WITH THE MOVING PAPERS?

MR. AGESON: YES, YOUR HONOR. WE HAVE THE PROOF OF SERVICE EXECUTED BY MY SECRETARY UNDER PENALTY OF PERJURY THAT WAS MAILED TO PLAINTIFF AT THE ADDRESS, WHICH HAS BEEN THE ADDRESS OF THE PLAINTIFF THROUGHOUT THIS PROCEEDING.

THE COURT: VERY WELL.

MR. AGESON: YOUR HONOR, THAT WAS RETURNED TO ME SUBSEQUENT TO THAT. I DON'T HAVE THE ENVELOPE WITH ME, I APOLOGIZE FOR THAT, BUT I DO KNOW I RECEIVED IT SOMETIME LATER. I HAD NO WAY OF REACHING MR. JACOBSEN.

THE COURT: IT WAS RETURNED TO YOU WHY? THE POST OFFICE SAID NO LONGER RESIDING AT THAT ADDRESS?

MR. AGESON: RIGHT. AND I WENT BACK TO CHECK OUR PROOF OF SERVICE TO SEE THAT WE DID STATE IT CORRECTLY AND I JUST DON'T KNOW WHAT HAPPENED. I CAN SAY THAT IF THERE'S AN ISSUE OF FAIR OPPORTUNITY TO BE HEARD, IT'S QUITE CLEAR THAT THE PLAINTIFF IS WELL PREPARED TO BE HERE TODAY. HE WAS EVEN HERE LAST WEEK, SO I DON'T THINK THERE IS ANY PREJUDICE TO THE

PLAINTIFF IN RESPECT TO NOT HAVING AN OPPORTUNITY TO PROTECT HIS INTEREST HERE TODAY.

AS FAR AS THE SERVICE, I THINK WE QUESTION -- TECHNICALLY THE PLAINTIFF HAS TO MAKE A DECISION WHETHER HE WANTS TO SERVE UNDER FEDERAL OR STATE LAW. ACCORDING TO THE PROOF OF SERVICE, THE ELECTION WAS MADE TO DO IT UNDER FEDERAL LAW. AND MY PAPERS, I DESCRIBE THE BASIC WAYS TO CONSERVE UNDER FEDERAL LAW. THE EXCEPTION OR SPECIAL CIRCUMSTANCES THAT APPARENTLY HE'S NOW RELYING ON IS THE QUESTION OF WHETHER WE -- CERTIFIED MAIL WITH AN ACCEPTANCE OF SERVICE APPLIES UNDER RULE 4 (C) (2) (C) (2).

AGAIN, I HAVEN'T HAD THE BENEFIT OF ANY OPPOSITION BEING FILED ON ME TO GIVE YOU ANY COUNTER ARGUMENTS TODAY.

THE COURT: ON 4C. WELL, HOLD ON A SECOND. I HAVE MY RULE HERE. 4C2, IS THAT THE EXCEPTION?

MR. AGESON: I BELIEVE IT'S 4CII, CAPITAL C, SMALL ROMAN NUMERAL TWO. GOES BACK AND FORTH BETWEEN C AND TWO.

THE COURT: WELL, IN MY 2004 REVISED EDITION, I HAVE RULE 4C2, BUT THERE'S NO ROMAN NUMERAL TWO THAT YOU'RE TALKING ABOUT.

MR. AGESON: IS THERE A SUBPART CAPITAL C OF SUBSECTION TWO, YOUR HONOR?

THE COURT: NO. IT SAYS RULE 4(C) IS SERVICE WITH COMPLAINT BY WHO MADE. AND THEN 4(C) (2) SAYS, SERVICE MAY BE EFFECTED BY ANY PERSON WHO IS NOT A PARTY AND WHO IS AT LEAST 18 YEARS OF AGE. AT THE REQUEST OF THE PLAINTIFF, HOWEVER, THE COURT MAY DIRECT THAT SERVICE BE EFFECTED BY UNITED STATES MARSHAL, DEPUTY UNITED STATES MARSHAL, OR OTHER PERSON OR OFFICER ESPECIALLY APPOINTED BY THE COURT FOR THAT PURPOSE. SUCH AN APPOINTMENT MUST BE MADE WHEN THE PLAINTIFF IS AUTHORIZED TO PROCEED IN PRO PER PURSUANT FOR 28 U.S.C., SECTION 1915 OR IS AUTHORIZED TO PROCEED AS THE SEAMAN UNDER 28, U.S.C., SECTION 1916. THAT'S THE END OF 4C, IT GOES INTO 4D.

MR. AGESON: I DON'T HAVE MY COPY OF THE FEDERAL RULES WITH ME, YOUR HONOR.

THE COURT: HOLD ON ONE SECOND. JUST SO YOU DON'T -- KAREN, WOULD YOU BE SO KIND ENOUGH TO HAND THAT TO COUNSEL.

THE CLERK: YES, YOUR HONOR.

THE COURT: WHAT IS 4B?

MR. AGESON: I'M SORRY, YOUR HONOR.

THE CITATION -- YOUR HONOR, APPARENTLY THE CITATION WHICH WE HAVE ALL BEEN WORKING UNDER IS INCORRECT. IT SHOULD BE 4D NOT C.

THE COURT: 4 (D).

MR. AGESON: (D) (2) .

THE COURT: TWO.

MR.AGESON: C.

THE COURT: 4(D)(2).

MR. AGESON: RIGHT.

THE COURT: WHAT DOES 4D2 SAY?

MR. AGESON: IN SUBSTANCE, I BELIEVE IT PERMITS A PLAINTIFF TO SUE A DEFENDANT BY REQUESTING WAIVER OF SERVICE OF SUMMONS UNDER CERTAIN SPECIFIED CONDITIONS, WHICH INCLUDE AN EXTRA COPY OF A NOTICE OF REQUEST, CERTAIN DESCRIPTION OF HOW THIS RULE WORKS, WHICH WE DID NOT RECEIVE. THE COMPLAINT AND SUMMONS THAT MR. JACOBSEN SENT ARE INTACT AND IN THE FILE. THEY DO NOT INCLUDE THE DESCRIPTIONS OF THE RULE AND HOW IT WORKS THAT ARE SET FORTH IN THIS SUBPART 4D.

FURTHERMORE, I BELIEVE THIS ALSO REQUIRES A CERTAIN SORT OF A FORM TO BE

FILLED OUT AND RETURNED BY THE DEFENDANT, WHICH WE DIDN'T RECEIVE. THE MERE SIGNING OF A CERTIFIED MAIL RECEIPT IS CONTRARY TO THE SPECIFICS OF THE RULE. THERE'S A CASE LAW THAT I BELIEVE I CITED THAT SAID THAT CERTIFIED MAIL IS NOT SUFFICIENT UNDER FEDERAL LAW.

ALSO, THE CONCEPT OF WHAT WE'RE DOING HERE IS IF A DEFENDANT WANTS TO CHOOSE, UNDER THE PENALTIES AND ADVANTAGES UNDER RULE 40, TO ACCEPT SERVICE BY MAIL, IT CAN DID SO. THERE IS A PENALTY FOR IT IF THEY DON'T DO SO.

HOWEVER, THERE IS NO AUTHORITY FOR A MAILROOM PERSON OR A CLERK IN A SOMEONE'S OFFICE TO SIGN FOR HIM. THAT'S ALL CERTIFIED MAIL RECEIPT CONSTITUTES. THIS WASN'T JUDGE HAYNES' SIGNATURE ON THE CERTIFIED MAIL RECEIPT. SO I DON'T THINK WE'RE EVEN CLOSE TO RULE 4D.

THE COURT: SO IT'S IMPOSSIBLE TO TELL WHOSE SIGNATURE IS ON THIS CERTIFIED MAIL RECEIPT. BUT YOU ARE SAYING IT'S NOT COMMISSIONER HAYNES.

MR. AGESON: I SPOKE TO HIM A LONG TIME AGO ABOUT THIS AND MY RECOLLECTION IS PRETTY CLEAR THAT IT WAS RECEIVED IN THE NORMAL COURSE THROUGH THE MAIL. HE DOESN'T NORMALLY PICK UP HIS OWN MAIL. IN ORDER TO GET A CERTIFIED MALE RE-

CEIPT, THAT HAD TO BE SIGNED BY SOMEONE AT THE EARLY STAGES OF THE MAILROOM PROCESS.

THE COURT: ALL RIGHT. NOW, SO WE CAN MINIMIZE COST AND DISRUPTION, ARE YOU NOW IN A POSITION TO ACCEPT SERVICE. I MEAN, YOU MIGHT BE ATTACKING THE COMPLAINT BY WAY OF A MOTION TO DISMISS BUT CAN YOU ACCEPT SERVICE OF THE COMPLAINT?

MR. AGESON: YES, YOUR HONOR. AS OF TODAY, WOULD BE FINE, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT. MR. JACOBSEN, IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD ON THE RECORD, SIR?

MR. JACOBSEN: YES. IS IT POSSIBLE TO ASK HIM SOME DIRECT QUESTIONS OR IS THAT NOT ALLOWED?

THE COURT: NOT ALLOWED AT THIS JUNCTURE, SIR. BUT YOU KNOW WHAT, I WOULD ENCOURAGE YOU AND MR. AGESON, AS A PROFESSIONAL COURTESY AND AT MY REQUEST, IF THERE ARE ANY QUESTIONS YOU HAVE, I ENCOURAGE BOTH OF YOU TO TALK. YOU CAN USE THOSE CONFERENCE ROOMS OUT THERE IF YOU CAN'T FIND A PLACE TO SIT OR YOU CAN TALK OUTSIDE THE HALL. AND HOPEFULLY HE'LL ANSWER THE QUESTIONS TO THE EXTENT HE CAN THAT YOU HAVE.

MR. JACOBSEN: I WOULD LIKE TO REEMPHASIZE SOME OF THE THINGS I SAID HERE BECAUSE WE SEEMED TO HAVE LOST TRACK ON A COUPLE OF THEM.

THE COURT: NO. I HEARD EVERYTHING YOU SAID, SIR.

MR. JACOBSEN: THERE IS AN EXCEPTION THAT ALLOWS CERTIFIED MAILING.

THE COURT: NO. I'M PRETTY FAMILIAR WITH THE RULES. AND I KNOW WHAT MY DISCRETION IS. AND I DO NOT LIKE PROCEDURAL DEFAULTS UNLESS THERE'S A GOOD REASON FOR THEM. AND IT SOUNDS LIKE THERE WAS A MIX UP HERE. AND WHETHER THAT'S RIGHT OR WRONG, I'M GOING TO LET .THE CASE PROCEED ON ITS MERITS AND YOU CAN LITIGATE ITS MERITS AND WE'LL SEE WHERE IT GOES.

MR. JACOBSEN: I NEED TO LET YOU KNOW AND SERVE A NOTICE OF APPEAL. WOULD I GIVE THAT TO HIM AND THE CLERK?

THE COURT: WELL, I CAN'T -- IT WOULD BE IMPROPER FOR ME TO ADVISE YOU ON WHAT YOUR RIGHTS ARE AND WHAT YOU NEED TO DO. YOU DO WHAT YOU FEEL IS NECESSARY AND APPROPRIATE. OKAY. ALL RIGHT. THANK YOU.

THE TENATIVE WILL BECOME THE FINAL RUL-

ING.

(WHEREUPON THE PROCEEDINGS WERE ADJOURNED UNTIL.)

CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING MATTER IS TRANSCRIBED FROM THE STENOGRAPHIC NOTES TAKEN BY ME AND IS A TRUE AND ACCURATE TRANSCRIPTION OF THE SAME.

MARIA BEESLEY-DELLANEVE, CSR-RPR
DATED: DECEMBER 7, 2004
OFFICIAL COURT REPORTER
LICENSE NO. 9132

EXHIBIT "D"

REPORT AND RECOMMENDATION OF UNITED STATES MAGITRATE JUDGE:

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.
DATED: d/_____
s/_____
DEPUTY CLERK

FILED
CLERK, U.S. DISTRICT COURT
MAR 29 2005
CENTRAL DISTRICT OF CALIFORNIA
BY s/_____ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH WILLIAM JACOBSEN, Plaintiff,
v.
CLARENCE E. HAYNES, ORANGE COUNTY CALIFORNIA Defendants.

Case No. CV 04-832 CJC(AN)

REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

DOCKETED ON CM
MAR 30 2005
BY s/_____039

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, United States District Judge; pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California.

I. BACKGROUND

On July 13, 2004, plaintiff Kenneth William Jacobsen ("Plaintiff"), proceeding in *pro se*, commenced this civil rights action against defendants County of Orange ("County") and Clarence E. Haynes, a Commissioner of the Superior Court of the State of California for the County of Orange, seeking damages, injunctive and declaratory relief in connection with a conviction and sentence that he suffered in a state misdemeanor case. In his complaint, Plaintiff alleges the "[d]efendants wrongly incarcerated, convicted, and placed Plaintiff on summary probation without jurisdiction and violated Plaintiff s constitutional secured rights under the United States Constitution to Due Process." [Complaint at 3:13-16.] In support of his complaint, Plaintiff has attached copies of three state court records from his misdemeanor case to his complaint as exhibits. The exhibits are copies of a verified state complaint dated December 8, 1999, an arraignment order dated December 20, 1999, and a probation order dated April 30, 2001. The allegations and attached exhibits establish that, on December 14, 1999, the County's District Attorney's Office filed the misdemeanor case against Plaintiff in the State Superior Court for the County of Orange charging Plaintiff with three misdemeanor counts on November 21, 1999 -- (1) resisting, obstructing and delaying a peace officer from discharging his duties in violation of Section 148(a) of the

California Penal Code ("CPC"), (2) having a concealed weapon described as a .25 caliber Beretta automatic pistol in a vehicle in violation of Sections 12025(a)(I) & (b)(6) of the CPC, and (3) carrying a loaded firearm in a vehicle in public in violation of Section 12031(a)(1).

On December 20, 1999, Plaintiff appeared before Commissioner Haynes for his arraignment and, after being advised of his rights, his bail hearing was continued to December 22, 1999. The arraignment order also states that Plaintiff "will not submit to the jurisdiction of the court." However, the subsequent probation order shows that, on April 30, 2001, Plaintiff again appeared before Commissioner Haynes and was convicted on counts 1 and 3 and ordered to serve 20 days in the Orange County Jail commencing on June 15, 2001. It also shows Plaintiff s sentence was effectively reduced to 11 days of jail because he was given 6 days of credit for time served plus 3 days of good time credit. Further, the probation order shows Plaintiffs sentence was suspended and that he was placed upon summary probation for three years and ordered to pay a $100 restitution fee. Plaintiff alleges that his summary probation terminated in April of 2004.

Both defendants have filed motions to dismiss the complaint pursuant to Rule 12(b)(6). Further, in support of his motion, Commissioner Haynes has requested the Court to take judicial notice of a certified copy of Plaintiffs General Misdemeanor Guilty Plea in his underlying misdemeanor case that Plaintiff did not attach as an exhibit to his complaint ("Guilty Plea") [Motion, Request for Judicial Notice at 3:4-10.] Paragraph 9 of the Guilty Plea establishes that Plaintiff knowingly and intelligently waived his right to appear before a judge in writing and

consented to Commissioner Haynes' jurisdiction to take his guilty plea and sentence him. Plaintiff confirmed his written consent to Commissioner Haynes' jurisdiction by placing his initials next to the consent provision in the Guilty Plea form. Plaintiff's Guilty Plea also shows that he consented to Commissioner Haynes' jurisdiction with the advice of counsel, who also signed the Guilty Plea and confirmed that Plaintiff had been advised of this consent provision and his constitutional rights before signing it Plaintiff has not objected to the Request for Judicial Notice; he has also failed to allege or show the Guilty Plea is not authentic.

On the other hand, Plaintiff has opposed both motions to dismiss on the merits. [08/25/04 Objection and Response to Defendant's Motion To Dismiss and to Strike Punitive Damage Allegation ("Opposition to County's Motion"); 01/28/05 Opposition to Defendant's Motion To Dismiss and Points and Authorities in Support ("Opposition to Haynes' Motion").] The matters now stand submitted for decision.

II. DISCUSSION

A. Standard of Review

1. Motion to Dismiss

Dismissal of an action is proper where a plaintiff fails to state a claim upon which Relief may be granted. Rule 12(b)(6); *Neitzke v. Williams,* 490 U.S. 319, 326-27,109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Such a dismissal may be based either on the "lack of a cognizable legal theory" or the "absence of sufficient facts alleged under a cognizable legal theory." *Balistreri* v. *Pacifica*

Police Dep't. 901 F.2d 696, 699 (9th Cir. 1988). In reviewing a motion to dismiss, all of the allegations of material fact must be taken as true and construed in the light most favorable to the nonmoving party. *Everest & Jennings* v. *American Motorists Ins. Co.,* 23 F.3d 226,228 (9th Cir. 1994). *Pro se* pleadings are held to a less stringent standard than those drafted by a lawyer. *Karim-Panahi* v. *Los Angeles Police Dept.,* 839 F.2d 621, 623 (9th Cir. 1988). "However, 'a liberal interpretation of a [pro se] civil rights complaint may not supply essential elements of the claim that were not initially pled [;] vague and conclusory allegations'" are insufficient to withstand a motion to dismiss. *Pena* v. *Gardner,* 976 F.2d 469, 471 (9th Cir. 1992). "The court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged [;n]or is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Cholla Ready Mix, Inc. v. Civish,* BLM., 382 F.3d 969, 973 (9th Cir. 2004).

2. Judicial Notice

In ruling upon a Rule 12(b)(6) motion, the district court may take judicial notice of official records and reports without converting the motion into a Rule 56 motion for summary judgment. *MGIC Indem. Corp.* v. *Weisman,* 803 F.2d 500, 504 (9th Cir. 1986). The court may also disregard allegations that contradict facts which may be judicially noticed. *Mullis v. United States Bankrupcty Court,* 828 F.2d 1385, 1388 (9th Cir. 1987). As discussed above, Plaintiff has not objected to Commissioner Haynes' Request for Judicial Notice of his Guilty

Plea or taken issue to its authenticity. Further, even if he had interposed a timely evidentiary objection, the objection would be frivolous since the proffered Guilty Plea is certified, admissible as a self-authenticating public record, and may be judicially noticed as an authentic public record. Fed.R.Evid. 803(8), 902(4) & 1005; *see MGIC Indem. Corp.*, 803 F.2d at 504; *Mack v. South Bay Beer Distributors, Inc., 798* F.2d 1279, 1282 (9th Cir. 1986).

Moreover, Plaintiff's failure to attach a copy of his Guilty Plea to his complaint as an exhibit does not prevent the Court from considering it because "a district court ruling on a motion to dismiss may consider a document the authenticity of which is not contested, and upon which the plaintiffs complaint necessarily relies." *Parrino v. FHP, Inc., 146* F.3d 699, 705-06 (9th Cir. 1998). The policy underlying this rule is designed to prevent plaintiffs from avoiding a Rule 12(b)(6) motion to dismiss "by deliberately omitting references to documents upon which their claims are based." *Parrino, id.* at 706. Plaintiff's written consent to Commissioner Haynes contradicts his factually unsupported legal conclusion that defendants were "without jurisdiction" to convict, sentence, and incarcerate him and goes to the very heart of Plaintiffs claims against both defendants. It is equally clear that, by attaching the complaint and two orders, Plaintiff s failure to attach his signed, written Guilty Plea as an exhibit was deliberate, and that he omitted it in order to prevent his claims from being summarily dismissed on the grounds that his conclusory "without jurisdiction" allegation was factually frivolous and malicious in addition to failing to state a claim upon which relief may be granted. Accordingly, Commissioner Haynes' request for judicial notice of the Guilty Plea is granted.

B. Analysis of Claims

1. The Damage Claims Against Commissioner Haynes

In his motion, Commissioner Haynes asserts that Plaintiff's claims are subject to dismissal because he is entitled to absolute judicial immunity and that the claims are otherwise barred by *Heek* v. *Humphrey,* 512 U.S. 477, 114 S.Ct. 2364 (1994) and the *Rooker-Feldman* doctrine.

As discussed above, Plaintiffs Guilty Plea establishes that Commissioner Haynes had jurisdiction over Plaintiff s misdemeanor case based upon Plaintiff's written consent, and that Plaintiff's conclusory allegation that he was "without jurisdiction" to preside over his misdemeanor case is factually frivolous. Commissioner Haynes had jurisdiction to preside over Plaintiffs arraignment despite Plaintiffs apparent refusal to submit to his jurisdiction. See C.P.C. §808, 825; Cal.Gov.Code, § 72190.1; *Branson* v. *Martin, 56* Cal.App.4th 300, 304,65 Cal.Rptr.2d 401, 404 (1997). A commissioner may also act with the full authority of a judge when it appears there has been (1) an order of the presiding judge of the court appointing the commissioner to act as a temporary judge, and (2) the actual or implied stipulation of the parties. Cal. Const., Art. VI, § 22; Cal. Rules of Court, Rule 6.609(b); *See In re Horton,* 54 Cal.3d 82, 90-91, 284 Cal.Rptr. 305, 306 (1991)*(en banc)* (in the absence of an oral or written stipulation, the parties' consent to a court commissioner to preside over the trial of a capital case as a "temporary judge" may also be inferred from the parties conduct); *Kim* v. *Superior Court,* 64 Cal.App.4th 256, 75 Cal.Rptr.2d 468 (1998). By giving his express written

consent to Commissioner Haynes, Commissioner Haynes had full jurisdiction to preside over Plaintiffs entire case, even if it had been a death penalty case instead of a misdemeanor. *Horton*, 54 Cal.3d at 86, 284 Cal.Rptr. at 306; *Branson*, 56 Cal.App.4th at 306 (in the absence of an express claim that the presiding judge has not designated a commissioner to act as a magistrate, it is presumed that a judicial officer has validly performed his or her duties and the court acted within its jurisdiction). Accordingly, Commissioner Haynes is entitled to absolute judicial immunity under the circumstances. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986)(*en banc*) ("Judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official capacities."); *Franceschi v. Schwartz*, 57 F.3d 828, 830 (9th Cir. 1995) (*per curiam*) (municipal court commissioners performing judge-like functions are entitled to absolute immunity from civil liability for damages).

Based upon the foregoing, Plaintiff's damage claim against Commissioner Haynes fails to state a §1983 claim for relief. Therefore, there is no need to consider whether this claim is also barred by *Heck* or the *Rooker-Feldman* doctrine, and his motion to dismiss the damage claim against him should be granted with prejudice.

2. Claim Against the County

Plaintiff s claim against the County is also based upon the same conclusory "without jurisdiction" allegation made against Commissioner Haynes, and the additional allegation that the County "is and was responsible for the operation of the Superior Court and each Superior Court under its jurisdiction." [Complaint at 2:19-21.]

In its motion to dismiss, the County argues Plaintiff s "without jurisdiction" claim should be dismissed because it is barred by the one-year statute of limitations set forth in "California *Code of Civil Procedure*, section 340(3)" ("C.C.P. § 340(3)") rather than the two-year statute of limitations set forth in "California *Code of Civil Procedure*, section 325.1." [County's Motion at 4:8-15.] Alternatively, the County argues the complaint should be dismissed because Plaintiff has failed to allege any violations of a County policy, custom, or practice, that the County is not responsible for the Superior Court of the State of California or its commissioner or judges, and that, even if Haynes was considered to be a County employee, a public entity cannot be held liable vicariously for the acts of its employees. [*Id.* at 4:18-5:8.] Plaintiff agrees that his claim is subject to the one-year limitations period of C.C.P. §340(3), however, he contends his claim is not time-barred because it did not accrue until his three-year probation period ended in April 2004. [Opposition to County's Motion at 6:1-7:17.]

a. Statute of Limitations

The question of whether Plaintiffs claim is time-barred rests upon when his claim accrued. Therefore, the issue of when Plaintiff s claim accrued is addressed first.

"Although state law determines the length of the limitations period, federal law determines when a civil rights claim accrues." *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir. 2000).[1/] Under federal law a civil rights action generally accrues when the plain-

[1/] Plaintiff also relies on Morales. [Opposition to County's Motion at 5:21-24.]

tiff "knows or has reason to know of the injury" giving rise to the action. *Elliot v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1994). As the Ninth Circuit pointed out in *Morales*, "[t]he primary question, then, is when did these plaintiffs know or have reason to know of the injury of which they complain?" *Morales*, 214 F.3d at 1154.

In *Morales*, the Ninth Circuit held that a §1983 cause of action based on police misconduct in a prior civil rights suit accrued when plaintiffs lost their cases in the trial court, not when all their appeals of those judgments were exhausted. *Id.* The plaintiffs asserted the police officers had falsified their testimony, causing the plaintiffs to lose their cases in state court and depriving them of their due process right of access to the courts. *Id.* at 1152. They contended that the limitations period did not begin to run until they had exhausted their appeals, because if they had prevailed on appeal, they would not have suffered the injury --losing their civil cases -- giving rise to their damages. *Id.* The Ninth Circuit disagreed, holding their misconduct claim accrued when the alleged police misconduct resulted in judgments being entered against the plaintiffs. "At that point, they knew or had reason to know that the alleged misconduct actually caused concrete injury." *Id.* at 1154. The court noted that its analysis was not affected by the possibility that the judgments of the state trial court might be reversed on appeal, which would render the federal civil rights claims moot: "[a]ccrual and mootness principles operate independently of each other." *Id.*; *see also Davis v. Harvey*, 789 F.2d 1332,1333 (9th Cir. 1986) (holding a §1983 claim for wrongful arrest accrued when the plaintiff was arrested, not when the state supreme court reversed his conviction).

Based upon the foregoing, the Court finds Plaintiff s §1983 claims accrued no later than April 30, 2001 -- the date he appeared before Commissioner Haynes, consented to his jurisdiction, pled guilty, and received his suspended sentence of three years probation. As of this date, Plaintiff knew about all of his alleged injuries arising from the defendants' alleged lack of jurisdiction. As discussed above, Plaintiff's allegations and exhibits establish his alleged injuries consist of his 6 days of pre-trial detention, conviction, and suspended sentence with three years of parole. The arraignment order establishes that Plaintiff expressly refused to submit to the defendants' jurisdiction on December 20, 1999. Therefore, Plaintiffs complaint and exhibits actually establish that he knew about the factual basis for the alleged injury arising from his pre-trial detention as early as December 20, 1999. It is equally undisputed that Plaintiff knew about the balance of his alleged injuries -- his conviction and suspended sentence of three years probation -- no later than April 30, 2001. Consequently, Plaintiff s "without jurisdiction" claim for all of his alleged injuries accrued on April 30, 2001 and, pursuant to C.C.P. 340 (3), Plaintiff had until April 30 2002, to commence this action. As discussed above, Plaintiff did not file his complaint until July 13, 2004 -- 805 days after the one year limitations period had already expired.[2/]

[2/] As discussed above, Plaintiff correctly acknowledges that the two-year limitations period set forth in C.C.P. §335.1 is inapplicable. This statute did not become effective until January 1, 2003, well after Plaintiffs claim accrued and was time-barred under the one-year limitations period in C.C.P. §340 (3). It is also well-settled that, under both federal and state law, C.C.P. §335.1 is not retroactive to Plaintiffs

Therefore, absent some basis for tolling, the action is time-barred.

b. Statutory Tolling

The purpose of tolling provisions is to provide potential plaintiffs with an opportunity to bring claims where circumstances beyond their control impede their ability to bring claims in a timely manner. C.C.P. 352.1 provides an inmate with up to two years of statutory tolling based upon the disability of imprisonment *Jones*, 393 F.3d at 927. The language of this tolling provision makes it clear that it only applies to a plaintiff who is either: (1) "imprisoned on a criminal charge" or (2) "in execution under the sentence of a criminal court for a term less than for life." *Id.* Plaintiff was never "imprisoned on a criminal charge" since he only received a suspended jail sentence, not a prison term. Further, he is not entitled to any statutory tolling for the 6 days he was a pretrial detainee since he was also not imprisoned or being held in custody pursuant to sentence. *See Jones, Id.* (C.C.P. 352.1's "literal language" does not cover detainees). Therefore, Plaintiff is not entitled to statutory tolling under the first part of C.C.P. §352.1. Further, although the statute does not define or explain what is meant by the terms "in the execution under the sentence of a criminal court for a

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"without jurisdiction" claim, and cannot be used to revive a claim that was already time-barred under C.C.P.340(3). *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004); *Jones v. Blanas*, 393 F.3d 918, 927 n.4 (2004); *Krupnick v. Duke Energy Morro Bay, L.L.C.*, 115 Cal.App.4th 1026, 1028-30, 9 Cal.Rptr.3d 767, 768-70 (2004) (holding C.C.P. §335.1 did not apply retroactively to

term less than for life," the second part of C.C.P. §352.1 only applies to prisoners who are in custody because of a jail sentence for a misdemeanor or a prison sentence for a felony because both of these situations would impede a plaintiffs meaningful access to the courts. As the Ninth Circuit recognized in *Jones*:

> Though California law provides for the tolling of a statute of limitations for a period of up to two years based on the disability of imprisonment, the language of the tolling provision applies only to plaintiffs 'imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term of less than for life.
>
> *****
>
> Observing that the law provides for tolling for criminal inmates "in recognition of their more limited ability to investigate their claims, to contact lawyers and to avail themselves of the judicial process, we have emphasized that "[i]n terms of limitations on the prisoner, continuous custody is the relevant disability." . . . . For this reason, we have held that "actual, uninterrupted incarceration is the touchstone" for applying California's tolling provision for the disability of imprisonment.

Jones, id. at 927-928 (citations and some internal quotations omitted). The "actual, uninterrupted incarceration"

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claims already barred). Moreover, even if C.C.P. §335.1 was applicable - which it is not -- Plaintiffs claim would still be time-barred since all of his claims still accrued no later than April 30, 2001, and he filed this action on July 13, 2004 -- 440 days after C.C.P. §335.1's two-year limitations period expired on April 30, 2003.

rule makes it clear that no basis for tolling exists under the second part of C.C.P. §352.1 once the plaintiff is released from custody and is subject to non-custodial probation.

Based upon the foregoing, the Court finds Plaintiff is not entitled to any statutory tolling under C.C.P. §352.1.

c. Equitable Tolling

Plaintiff has not made any allegations in his complaint or raised any arguments in his opposition papers, showing that he is entitled to any equitable tolling. Nonetheless, the Magistrate Judge finds that, even if Plaintiff had argued that he should be entitled to equitable tolling, the argument would fail as a matter of law under the circumstances.

"In order for a statute of limitations to be equitably tolled, there must be a showing of three things: first, that the plaintiff gave timely notice to the defendant of the plaintiffs claim; second, that the resultant delay did not cause prejudice to the defendant's position; and third, that the plaintiff acted reasonably and in good faith." *Ervin v. County of Los Angeles*, 848 F.2d 1018, 1020 (9th Cir. 1988). Although equitable tolling is generally resolved on summary judgment, it is appropriate to resolve this issue on a motion to dismiss where the complaint and judicially noticed matters show that Plaintiff is not entitled to equitable tolling as a matter of law. *See Ervin v. County of Los Angeles*, 848 F.2d 1018, 1020 (9th Cir. 1988) (year and a half wait to file second claim

unreasonable and not in good faith), *cert. den.*, 489 U.S. 1014, 109 S.Ct. 1125 (1989).

In Jones, the Ninth Circuit held that, although the literal terms of C.C.P. §352.1 do not apply to civil detainees, civil detainees who act in good-faith to pursue their claims but are subject to terms of detention that are similar to those of prisoners may be entitled to equitable tolling for the time they face "actual, uninterrupted incarceration." *Jones, id.* at 928-30. The Ninth Circuit explained that "our rationale for the 'actual, uninterrupted incarceration' rule in the context of tolling for criminal imprisonment is equally applicable to the context of civil confinement: civil detainees, like their criminal counterparts, suffer from 'more limited ability to investigate their claims, to contact lawyers and to avail themselves of the judicial process." *Id.* at 929. The Magistrate Judge finds the reasons for extending equitable tolling principles to civil detainees should also be available to criminal detainees who allege and show they faced similar impediments to court access during their actual detention.

Plaintiff s allegations and exhibits establish that he was held for 6 days of pre-trial detention, and that he received a sentence consisting of a 20-day jail term that was effectively reduced to 11 days and then suspended. Plaintiff has not alleged nor shown that he ever served 11 days of jail time. Nor has he alleged or shown that his meaningful access to the courts was impeded during the times he was detained or at any time he was on non-custodial probation. Regardless, even assuming that Plaintiff was jailed for 20 days and never received 6 days of credit for his 6 days of pre-trial detention, at best Plaintiff would be entitled to 26 days of equitable tolling,

and his claim would still be untimely by 779 days (805 days - 26 days). Accordingly, Plaintiffs claim against the County is not saved by equitable tolling and is time-barred.

Plaintiff is not entitled to equitable tolling as a matter of law because the allegations in his complaint and the Guilty Plea establish that, by filing his complaint more than two years after the statute had expired, plaintiff did not give timely notice of his claim to the County. Further, the Guilty Plea, which is now part of the Court's records and subject to judicial notice, clearly establishes that Plaintiff s "without jurisdiction" claim is factually frivolous and not brought in good-faith. As its name implies, equitable tolling is an equitable remedy that is subject to well-settled maxims of jurisprudence that include "one who seeks equity, must do equity," and "no one can take advantage of his own wrong."

Since Plaintiffs claim against the County is time-barred, there is no need to discuss its other grounds for dismissal. Accordingly, the County's motion to dismiss should be granted and its alternative motion to strike should be denied as moot.

3. Requests for declaratory and injunctive relief

In his prayer for relief, Plaintiff alleges that he seeks "[a] declaratory judgment that the Defendants[']' acts and practices described herein violated Plaintiffs rights as herein stated" and that he seeks "[a] preliminary and permanent injunction which prohibits and requires that Defendants, their agents, employees, successors, law

enforcement, city, state, or federal, cease harassment, retaliation, and reprisals for Plaintiff s court litigation." [Complaint at 4:23-5:13.]

In order for Plaintiff to obtain injunctive relief, he has the burden of showing: (1) that he has a strong likelihood of success on the merits; (2) he will suffer irreparable injury and has no adequate remedy at law if injunctive relief is not granted; (3) the balance of hardships tips in his favor; and (4) granting the injunction is in the public interest. *See Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674- 75 (1984). As discussed above, Plaintiff is not likely to succeed on the merits because his "without jurisdiction" claims against both defendants are factually frivolous and fatally flawed as a matter of law.

It is well-settled that "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest[,]" *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948), and that "[d]eclaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. Washington*, 759 F.2d 1353, 1457 (9th Cir. 1985) (en banc). Given that Plaintiffs underlying claims against both defendants are frivolous and fail to state a claim, no useful purpose would or could be served in issuing a declaratory judgment in his favor.

Accordingly, the defendants' motions to dismiss Plaintiffs requests for declaratory and injunctive relief should also be granted without leave to amend.

III. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the motions to dismiss be GRANTED without leave to amend, the County's motion to strike be denied as moot, and that judgment be entered dismissing the entire action with prejudice.

DATE: March 28, 2005

s/_____
ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

EXHIBIT "E"

DOCKET SHEET OF EVENTS:

U.S. District Court
CENTRAL DISTRICT OF CALIFORNIA
(Southern Division - Santa Ana)
CIVIL DOCKET FOR CASE #: 8:04-cv-00832-CJC-AN

Kenneth W Jacobsen et al v. Clarence E Haynes et al
Assigned to: Judge Cormac J. Carney
Referred to: Magistrate Judge Arthur Nakazato
Cause: 42:1983 Civil Rights Act
Date Filed: 07/13/2004
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff
Kenneth William Jacobsen, represented by
Kenneth William Jacobsen
18141 Beach Boulevard, Suite 100
Huntington Beach, CA 92648
714-865-6068
PRO SE

Plaintiff
John Does 1-10 represented by
John Does 1-10
PRO SE

V.

Defendant
Clarence E Haynes

represented by
Martin Ageson
CAAG - Office of Attorney
General of California
300 S Spring St, Ste 7 S
Los Angeles, CA 90013-1204
213-897-2000
Fax: 213-897-2810
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant
Orange County California
Erroneously Sued As
County of Orange

represented by
Glen A Stebens
Beam Brobeck & West
6
600 West Santa Ana Boule
vard Suite 1000
Santa Ana, CA 92701
714-558-3944
Fax: 714-568-0129
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John E West
Beam Brobeck & West
600 W Santa Ana Blvd, Ste
1000
P O Box 22022
Santa Ana, CA 92701-4586
714-558-3944
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/13/2004	1	COMPLAINT against defendants Clarence E Haynes, Orange County California. (Filing fee $ 150.) Jury Demand; filed by plaintiffs Kenneth William Jacobsen, John Does 1-10. (ln,) (Entered: 07/19/2004)
07/13/2004	2	CERTIFICATION AND NOTICE of Interested Parties filed by Plaintiffs Kenneth William Jacobsen, John Does 1-10. (ln,) (Entered: 07/19/2004)
08/05/2004	3	NOTICE of Interested Parties filed by Defendant County of Orange (erroneously sued and served as Orange County California) (ln,) (Entered: 08/09/2004)
08/05/2004		FAX number for Attorney John E West is 714-568-0129. (ln,)(Entered: 08/09/2004)
08/05/2004	4	NOTICE OF MOTION AND MOTION to Dismiss Complaint for Failing to State Claim Pursuant to FRCP 12(b)(6); filed by defendant Orange County California. Motion set for hearing on 9/13/2004 at 01:30 PM before Honorable Cormac J. Carney. (ln,) (Entered: 08/10/2004)
08/05/2004	5	NOTICE OF MOTION AND MOTION to Strike Punitive Damage Allegations from Plaintiffs Complaint; Memorandum of Points and Authorities in Support Thereof; filed by defendant Orange

		County California. Motion set for hearing on 9/13/2004 at 01:30 PM before Honorable Cormac J. Carney. (ln,) (Entered: 08/10/2004)
08/05/2004		MOTION to Dismiss Case[4], and MOTION to Strike[5] REFERRED to Arthur Nakazato. (kks) (Entered: 03/15/2005)
08/11/2004	**6**	Amendment to MOTION to Strike[5] filed by defendant Orange Count California. (dmjr,) (Entered: 08/17/2004)
08/11/2004	**7**	Amendment to MOTION to Dismiss Case[4] filed by defendant Orange County California. (dmjr,) (Entered: 08/17/2004)
08/25/2004	**8**	OBJECTION AND RESPONSE to Defendants MOTION to Dismiss Case [4], MOTION to Strike[5]; filed by plaintiff Kenneth William Jacobsen. (ln,) (Entered: 08/27/2004)
08/25/2004	**9**	PROOF OF SERVICE Executed by plaintiff Kenneth William Jacobsen, upon Clarence E Haynes served on (date not indicated); The Summons and Complaint were served by US Mail service, by (not indicated) statute, upon (not indicated). Due Dilligence declaration not attached. Original Summons not returned. (ln,) (Entered: 08/27/2004)

08/25/2004 **10** REQUEST for Clerk to Enter Default: Rule 55(a)(1), Rules of Civil Procedure and Local Rule 55-1; against defendant Clarence E Haynes filed by plaintiff Kenneth William Jacobsen. (ln,) (Entered: 08/27/2004)

08/25/2004 **11** NOTICE For Court Clerk to Enter Default: Rule 55(a)(1), Rules of Civil Procedure and Local Rule 55-1; filed by plaintiff Kenneth William Jacobsen. (ln,) (Entered: 08/27/2004)

08/25/2004 **13** NOTICE OF CLERICAL ERROR Re: Matter assigned as discovery case in error; Matter reassigned pursuant to general order 194 (csb,) (Entered: 08/30/2004)

08/25/2004 Judge Arthur Nakazato added. Judge Arthur Nakazato no longer assigned to case. (csb,) (Entered: 08/30/2004)

08/27/2004 **12** NOTICE OF DEFICIENCY Re: [10] REQUEST for Clerk to Enter Default against defendant Clarence E Haynes. The Clerk cannot enter the requested relief as proof of service is lacking required information. (ln,) (Entered: 08/27/2004)

09/03/2004 **14** AMENDED NOTICE OF CLERICAL ERROR Re: 13: You are hereby notified that due to a clerical error. All documents

filed with the court must reflect the following case number and judges' intials: SACV 04-832 CJC (AN) to ensure proper routing of documents. Case has been as signed as a discovery case in error, matter reassigned pursuant to General Order 194 (mt,) (Entered: 09/03/2004)

09/03/2004 **16** REPLY to Opposition to MOTION to Dismiss Case[4] filed by defendant Orange County California. (ln,) (Entered: 09/09/2004)

09/07/2004 **15** MINUTES OF (In Chambers) Conference held before Judge Arthur Nakazato; Order by Judge Arthur Nakazato: motions are placed on Magistrate Judges calendar for 09/16/04; defendant County of Oranges MOTION to Strike[5] and MOTION to Dismiss Case[4] are taken Under submission without hearing pursuant to Local Rule 7-15; Court Reporter: none. (ln,) (Entered: 09/08/2004)

09/16/2004 **17** OBJECTION TO MAGISTRATES JURISDICTION: 28 USC Sec 636; filed by Plaintiff Kenneth William Jacobsen. (ln,) (Entered: 09/22/2004)

09/22/2004 **18** MINUTES OF (In Chambers) Conference held before Judge Cormac J. Carney: plaintiffs Objections to Magistrates Jurisdiction filed 09/16/04 Is

OVERRULED; Court Reporter: none. (ln,) (Entered: 09/29/2004)

09/24/2004 **19** AMENDED PROOF OF SERVICE Executed by plaintiff Kenneth William Jacobsen, upon Clarence E Haynes served on 7/13/2004, answer due 8/2/2004. The Summons and Complaint were served by certified mail service, by Federal statute, upon West Justice Center on 07/15/04. Due Dilligence declaration not attached. Original Summons not returned; original certified return receipt attached (ln,) (Entered: 10/06/2004)

09/24/2004 **20** RECONSIDERATION FOR COURT CLERK to Enter Default: Rule 55 (a)(1), Rules of Civil Procedure and Local Rule 55-1 against defendant Clarence E Haynes filed by plaintiff Kenneth William Jacobsen. (ln,) (Entered: 10/06/2004)

10/06/2004 **21** DEFAULT BY CLERK ENTERED as to Defendant Clarence E Haynes (ln,) (Entered: 10/06/2004)

10/18/2004 **22** NOTICE OF MOTION AND MOTION to Set Aside Default 21; Memorandum of Points and Authorities; Declaration of Martin Ageson filed by defendant Clarence E Haynes; Motion set for hearing on 11/8/2004 at 01:30 PM before Honorable Cormac J. Carney. (esa,) (Entered: 10/26/2004)

10/22/2004 **23** REQUEST for Clerk to Enter Judgment by Default: Rule 55(a)(b)(1), FRCP, against defendant Clarence E Haynes; filed by plaintiff Kenneth William Jacobsen. (ln,) (Entered: 10/27/2004)

10/27/2004 **24** NOTICE OF DEFICIENCY Re: plaintiffs REQUEST for Default Judgment against defendant Clarence E Haynes [23]. The Clerk cannot enter the requested relief as Amount sought is not for a sum certain. (ln,) (Entered: 10/27/2004)

11/15/2004 **26** NOTICE OF APPEAL to 9th CCA filed by plaintiff Kenneth William Jacobsen. Appeal of Clerks Entry of Default (CV - 37)21 Filed On: 10/6/04; Entered On: 10/6/04; Filing fee $ 255, Billed. cc: Kenneth William Jacobsen. (ghap,) (Entered: 11/19/2004)

11/15/2004 **28** MINUTES OF Motion Hearing held before Judge Cormac J. Carney: Defendant's MOTION to Set Aside Default [22]. Tentative ruling issued to counsel prior to matter being called. Court accepts defense counsel's acknowledgment of having received the service of summons and com plaint on behalf of defendant Clarence E Haynes as of today's date. Court GRANTS defendant's motion to Set Aside Default. Court Reporter: Maria Dellaneve. (mt,) Entered: 11/22/2004)

11/16/2004 **25** MINUTES OF (In Chambers) Conference held before Judge Cormac J. Carney; Order by Judge Cormac J. Carney: defendant Clarence Haynes MOTION to Set Aside Default Re: Clerks Entry of Default (CV-37) 21, [22] is GRANTED; Court Reporter: none. (ln,) (Entered: 11/18/2004)

11/22/2004 **27** CERTIFICATE OF RECORD Transmitted to USCA re Appeal to Circuit Court [26] filed by Kenneth William Jacobsen. (weap,) (Entered: 11/22/2004)

11/22/2004 Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: Appeal to Circuit Court [26]. (weap,) (Entered: 11/22/2004)

11/29/2004 **29** Mail Returned addressed to Kenneth W. Jacobsen re [26] Notice of Appeal, Certificate of Record and Billing letter. (weap,) (Entered: 11/29/2004)

11/30/2004 **31** Mail Returned addressed to Kenneth William Jacobsen (esa,) (Entered: 12/08/2004)

12/02/2004 **32** NOTICE of Change of Address by attorney Glen A Stebens for Defendant Orange County California, changing address to 600 West Santa Ana Boulevard, Suite 1000, Santa Ana, CA 92701-4586. Filed by defendant Orange County California (ln,) (Entered: 12/09/2004)

12/02/2004 **33** NOTICE of Change of Address by attorney John E West for Defendant Orange County California, changing address to 600 West Santa Ana Boulevard, Suite 1000, Santa Ana, CA 92701-4586. Filed by plaintiff Orange County California (ln,) (Entered: 12/09/2004)

12/03/2004 APPEAL FEE PAID: re [26] Appeal to Circuit Court filed by Kenneth William Jacobsen Receipt Number: 8787; In the amount of $255. (ghap,) (Entered: 12/07/2004)

12/07/2004 **30** Notice of Interested Parties filed by Defendant Clarence E Haynes. (dmjr,) (Entered: 12/08/2004)

12/07/2004 **37** NOTICE OF MOTION AND MOTION to Dismiss Complaint [1]; Request that Judicial Notice be Taken; Certification of Compliance with Local Rule 7.3 filed by defendant Clarence E Haynes. Motion set for hearing on 1/3/2005 at 01:30 PM before Honorable Cormac J. Carney.(kks) (Entered: 12/17/2004)

12/07/2004 **38** MEMORANDUM OF POINTS AND AUTHORITIES in Support of MOTION to Dismiss 37] Complaint [1] filed by defendant Clarence E Haynes. (kks) (Entered: 12/17/2004)

12/08/2004 **35** RECEIPT OF REPORTERS TRAN

SCRIPT of proceedings for the following dates: 11/15/04 Court Reporter: M Bellarev (dmjr,) (Entered: 12/17/2004)

12/08/2004 **36** TRANSCRIPT filed for proceedings held on 11/15/04. Court Reporter: M Dellareve.(dmjr,) (Entered:12/17/2004)

12/13/2004 **34** NOTIFICATION by Circuit Court of Appellate Docket Number 04-57025, 9th CCA regarding Appeal to Circuit Court [26] filed by Kenneth William Jacobsen. (cbr,) (Entered: 12/13/2004)

12/22/2004 **39** MINUTES OF IN CHAMBERS ORDER by Judge Cormac J. Carney :, RE: MOTION to Dismiss Case re Complaint - (Discovery) [1] [37], Set Deadlines as to MOTION to Dismiss Case re Complaint - (Discovery) [1][37]. Responses due by 1/31/2005 Replies due by 2/7/2005. Motion set for hearing on 2/14/2005 at 01:30 PM before Honorable Cormac J. Carney. Court Reporter: none. (dmjr,) (Entered: 12/27/2004)

12/29/2004 **40** MINUTES OF IN CHAMBERS ORDER by Judge Cormac J. Carney : motion to dismiss is referred to Magistrate Nakazato, previous briefing schedule vacated (dmjr,) (Entered: 01/03/2005)

12/29/2004 MOTIONS MOTION to Dismiss Case re Complaint - (Discovery) [1][37] REFERRED to Magistrate Nakazato. (dmjr,) (Entered: 01/03/2005)

01/03/2005 **41** ORDER from 9th CCA filed as to Appeal to Circuit Court [26] filed by Kenneth William Jacobsen,, CCA # 04-57025. Or der received in this district on 1/5/05. Appellant's motion for an extension of time in which to file the opening brief is granted. The opening brief is due 2/14/05. (weap,) (Entered: 01/11/2005)

01/10/2005 **42** MINUTES OF IN CHAMBERS ORDER by Judge Arthur Nakazato :, taking under submission MOTION to Dismiss Case re Complaint (Discovery) [1][37] Opposition due 1/31/05, reply 2/7/05, no extensions granted Court Reporter: NONE. (dmjr,) (Entered: 01/11/2005)

01/28/2005 **43** OPPOSITION to MOTION to Dismiss Case re Complaint - (Discovery) [1] [37] filed by plaintiff Kenneth William Jacobsen. (dmjr,) (Entered: 02/01/2005)

02/10/2005 **44** NOTICE of non-receipt of opposition to motion to dismiss filed by defendant Clarence E Haynes. (dmjr,) (Entered: 02/16/2005)

02/15/2005 **45** MINUTES OF IN CHAMBERS ORDER by Judge Arthur Nakazato : plaintiff

ordered to file a certified mail receipt by 2/21/05 of his opposition to motion to dismiss. Dewfendnat has to 2/28/05 to file a reply. Court Reporter: none. (dmjr,) (Entered: 02/16/2005)

02/15/2005 **46** MANDATE of 9th CCA filed as to Ap peal to Circuit Court [26], CCA # 04-57025. The judgment of said district court, appeal is dismissed for lack of jurisdiction. Mandate received in this district on 2/18/05. (ghap,) Modified on 3/29/2005 (ghap,). (Entered: 02/23/2005)

02/23/2005 **47** NOTICE of non receipt of plaintiffs opposition filed by plaintiff Kenneth William Jacobsen. (dmjr,) (Entered: 03/02/2005)

03/01/2005 **48** REPLY to response to MOTION to Dismiss Case re Complaint—(Discovery) [1][37] filed by defendant Clarence E Haynes.(dmjr,) (Entered: 03/04/2005)

03/09/2005 **49** NOTICE OF INTERVENING CASE LAW filed by Plaintiff Kenneth William Jacobsen. (ln,) (Entered: 03/11/2005)

03/29/2005 **50** NOTICE OF FILING REPORT AND RECOMMENDATION by Magistrate Judge Arthur Nakazato and Lodging of Proposed Judgment and Order. Objections to R&R due by 4/15/2005 (twdb,) Entered: 03/30/2005)

03/29/2005 **51** REPORT AND RECOMMENDATION by Magistrate Judge Arthur Nakazato. IT IS RECOMMENDED that the motions to dismiss be GRANTED without leave to amend, the County's motion to strike be denied as moot, and that judgment be entered dismissing the entire action with prejudice. Re MOTION to Dismiss Case re Complaint - (Discovery) [1][37], MOTION to Dismiss Case[4], MOTION to Strike[5] (twdb,) (Entered: 03/30/2005)

04/12/2005 **52** OBJECTION to Report and Recommendation (Issued), Report and Recommendation (Issued) 51 filed by plaintiff, in pro se Kenneth William Jacobsen. (sv) (Entered: 04/13/2005)

04/14/2005 **53** ORDER APPROVING AND ADOPTING Report and Recommendation of United States Magistrate Judge by Judge Cormac J. Carney: IT IS HEREBY ORDERED that: Plaintiffs Objections to Report and Recommendation (Issued) 51 are overruled; Report and Recommendation is approved and adopted; Defendants MOTION to Dismiss Case re Complaint – (Discovery)[1][37], MOTION to Dismiss Case[4] are granted without leave to amend; Orange Countys MOTION to Strike[5] is denied as moot and Judgment shall be entered dismissing action with prejudice; (ln,) (Entered: 04/15/2005)

04/14/2005 **54** JUDGMENT by Judge Cormac J. Carney: IT IS HEREBY AD JUDGED that action is dismissed with prejudice for reasons set forth in Magistrate Judges Report and Recommendation; (MD JS-6, Case Termi nated).(ln,) (Entered: 04/15/2005)

04/22/2005 **55** NOTICE OF APPEAL to 9th CCA filed by plaintiff Kenneth William Jacobsen. Appeal of Judgment 54 Filed On: 4/14/05; Entered On: 4/15/05; Filing fee $255, Paid receipt number 73458. cc: Kenneth Wil liam Jacobsen; State Attorney General; Glen A. Stebens. (ghap,) (Entered: 04/26/2005)

04/27/2005 Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: Appeal to Circuit Court [55]. (cbr,) (Entered: 04/27/2005)

05/09/2005 **56** NOTIFICATION by Circuit Court of Appellate Docket Number 05-55623, 9th CCA regarding Appeal to Circuit Court, [55] filed by Kenneth William Jacobsen,. (nm,) (Entered: 05/09/2005)

05/24/2005 **57** NOTICE of Appellee Designation of Transcripts Needed, filed by defendant Clarence E Haynes. (cbr,) (Entered: 05/26/2005)

11/07/2005 **58** RECORD ON APPEAL sent to Circuit Court re: Appeal number, 05-55623 Record consists of 1 volumes, 1 transcript. (cbr,) Entered: 11/07/2005)

04/10/2006 **59** MANDATE of 9th CCA filed as to Appeal Number Info from USCA (A-8) [56], Appeal to Circuit Court, [55], CCA # 05-55623. The judgment of district court, appeal is affirmed Mandate received in this district on 4/14/06. (ghap,)(Entered: 04/17/2006)

PACER Service Center
Transaction Receipt
04/27/2006 16:31:53

EXHIBIT "F"

MEMORANDUM:

FILED
MAR 17 2006
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH WILLIAM JACOBSEN, Plaintiff—Appellant, v. CLARENCE E. HAYNES; et al., Defendants—Appellees	No. 05-55623 D.C. No. CV-04 00832-CJC(AN) MEMORAN-DUM*

Appeal from the United States District Court
For the Central District of California
Cormac J. Carney, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted March 8, 2006**

Before: **CANBY, BEEZER, and KOZINSKI, Circuit Judges.**

Kenneth William Jacobsen appeals pro se from the district court's judgment dismissing his civil rights action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. We have jurisdiction pursuant to 28 U.S.C.§ 1291 .We review de novo, *Zimmerman v City of Oakland*, 225 F.3d 734, 737 (9th Cir. 2001), and we affirm.

The district court properly dismissed Jacobsen's action against Commissioner Haynes as barred by judicial immunity. *See Franceschi v. Schwartz*, 57 F.3d 828, 830 (9th Cir. 1995)

Jacobsen's objection to the magistrate judge's jurisdiction is without merit. *See* 28 U.S.C. .§ 636(b)(1)(B) (a district court judge can designate a magistrate judge to issue proposed findings of fact and recommendations).

The district court did not abuse its discretion in granting Haynes's motion to set aside the default because Haynes did not engage in any culpable conduct that led to the default, and had not been properly served. *See Franchise Holding II, LLC. v. Huntington Restaurants Group, Inc.*, 375 F.3d 922, 925-26 (9th Cir. 2004).

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Jacobsen's remaining contentions are unpersuasive.

AFFIRMED